

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, NOVEMBER 1, 2006

DOCUMENT CONTROL

PETITION OF

VIRGINIA ELECTRIC AND POWER COMPANY

2006 NOV -1 P 3: 29
CASE NO. PUE-2006-00075

For Certain Initial Determinations with
Regard to Virginia Code § 56-585 G

FINAL ORDER

On June 30, 2006, Virginia Electric and Power Company ("Dominion Virginia Power" or "Company") filed a Petition with the State Corporation Commission ("Commission") seeking certain initial determinations with regard to § 56-585 G of the Code of Virginia ("Code"). By way of background, the Company stated as follows: (1) "[i]n 2004, the General Assembly amended the Virginia Electric Utility Restructuring Act¹ by adding a new subsection, Virginia Code § 56-585 G ('the Provision'), regarding construction of a coal-fired generation facility in the coalfield region of Virginia ('Coal Plant' or 'Plant');" and (2) "[t]he Provision states that its purpose is '[t]o ensure a reliable and economic supply of electricity, and to promote economic development,' and it declares that the construction of a Plant 'that utilizes energy resources located in the Commonwealth is in the public interest, and in determining whether to approve such [a] facility, the [State Corporation] Commission shall liberally construe the provisions of this title.'"²

The Company emphasized that it is not now requesting the Commission to approve construction of the Plant: "[T]he present filing is not a petition for approval to construct a Plant under the Provision. Rather, it is a request that the Commission decide important prerequisite

¹ Va. Code §§ 56-576 *et seq.*

² Petition at 1 (quoting Va. Code § 56-585 G).

issues that will greatly facilitate the decision-making process of [Dominion Virginia Power], the Petitioner herein, with regard to whether the Company should later seek approval to build a Plant."³ Specifically, "the Company respectfully requests that the Commission issue an order that (1) approves the calculation and implementation of an 'Allowance for Funds Used During Construction' ('AFUDC') rate for the period during the planning and construction of a Plant pursuant to Virginia Code § 56-585 G, (2) approves a 'risk premium' during the commercial operation of the facility, and (3) grants exemptions from certain portions of the electric utility bidding rules found at 20 VAC 5-301-10 *et seq.* ('[Bidding] Rules')." ⁴

On July 13, 2006, the Commission issued an Order for Notice and Hearing that, among other things, docketed this proceeding, required the Company to give notice of its Petition, established a procedural schedule for comments and testimony, scheduled a public hearing for October 17, 2006, and assigned this case to a Hearing Examiner.⁵

On August 22, 2006, the Virginia Committee For Fair Utility Rates ("Committee") filed a Motion to Dismiss ("Motion to Dismiss"). The Committee asserted that the Petition asks for an advisory opinion in violation of the Commission's rules and the statutory scheme. The Committee also asserted that the Commission must dismiss the Petition "because it requests relief – *i.e.*, exemption from the bidding rules for a petition that [the Company] might some day decide to file – that the Commission may not grant."⁶

³ *Id.* at 3.

⁴ *Id.*

⁵ The Commission also issued a Supplemental Order for Notice and Hearing on July 27, 2006.

⁶ Committee's August 22, 2006 Motion to Dismiss at 10.

The participants in this case filed responses to the Motion to Dismiss on August 31, 2006. Dominion Virginia Power requested that the Motion to Dismiss be denied. Appalachian Power Company ("Appalachian Power") also urged that the Motion to Dismiss be denied. The Commission's Staff ("Staff") stated that the Commission should either (1) grant the Motion to Dismiss, or (2) direct dismissal unless the Company files an application under § 56-585 G of the Code within six months. On September 7, 2006, the Committee filed a reply to the responses.

On September 15, 2006, Chief Hearing Examiner Deborah V. Ellenberg issued a Ruling and Certification to the Commission ("Ruling"). The Chief Hearing Examiner found that the Motion to Dismiss should be granted, certified such Ruling to the Commission *sua sponte* pursuant to 5 VAC 5-20-120 B, and suspended the procedural schedule for the filing of testimony and the previously scheduled hearing until further order of the Commission.

On September 20, 2006, the Commission issued an order providing that: (1) notices of participation, as permitted in Ordering Paragraph (5) of the Commission's July 13, 2006 Order for Notice and Hearing, may be filed on or before October 3, 2006; (2) on or before October 11, 2006, the Company, respondents, and Staff may file comments on the Ruling; and (3) the public hearing shall be convened on October 17, 2006, as previously scheduled.

On October 11, 2006, comments on the Ruling were filed by: the Company; Appalachian Power; the Committee; the Office of the Attorney General's Division of Consumer Counsel ("Consumer Counsel"); and the Staff. The Company, Appalachian Power, and Consumer Counsel object to the Ruling. The Committee and Staff support the Ruling.

A public hearing was held on October 17, 2006. James C. Roberts, Esquire, Edward L. Flippen, Esquire, and Karen L. Bell, Esquire, appeared on behalf of the Company. Anthony Gambardella, Esquire, appeared on behalf of Appalachian. Edward L. Petrini, Esquire, appeared

on behalf of the Committee. C. Meade Browder, Jr., Esquire, and D. Mathias Roussy, Jr., Esquire, appeared on behalf of Consumer Counsel. William H. Chambliss, Esquire, and Arlen K. Bolstad, Esquire, appeared on behalf of Staff.

The following public witnesses, listed in order of appearance, testified at the hearing: the Honorable William C. Wampler, Jr., Member, Senate of Virginia; the Honorable Phillip P. Puckett, Member, Senate of Virginia; the Honorable Terry G. Kilgore, Member, House of Delegates of Virginia; the Honorable Patrick O. Gottschalk, Virginia Secretary of Commerce and Trade; Jeffrey M. Anderson, Executive Director, Virginia Economic Development Partnership; John Heard, Legislative Counsel, Virginia Coal Association; Ron Flanary, Executive Director, LENOWISCO Planning District, and on behalf of Wise County and Town of St. Paul; Cale Jaffe, Southern Environmental Law Center; the Honorable Thomas K. Norment, Member, Senate of Virginia; Barbara F. Altizer, Executive Director, Eastern Coal Council; Jonathan Belcher, Acting Executive Director, Virginia Coalfield Economic Development Authority; Louis A. Zeller, Administrator and a Campaign Coordinator, Blue Ridge Environmental Defense League; the Honorable William T. Bolling, Lieutenant Governor of Virginia; Melissa Kemp, Public Citizen; Kathy R. Selvage of Stephens, Virginia; and Tammy Belinsky of Copper Hill, Virginia.

NOW UPON CONSIDERATION of this matter, the Commission is of the opinion and finds as follows.

Coal-Fired Generation Facility

We find that construction of a coal-fired generation facility under § 56-585 G of the Code that utilizes Virginia coal and is located in the coalfield region of the Commonwealth is in the public interest. Indeed, the General Assembly of Virginia explicitly directed such finding: "The construction of such facility that utilizes energy resources located within the Commonwealth is

in the public interest, and in determining whether to approve such facility, the Commission shall liberally construe the provisions of this title."⁷ We therefore reject, to the extent argued by Staff or other participants, the suggestion that the Commission must apply a separate public interest standard in evaluating an application to construct such a plant under this statute.⁸ Rather, the plain language of the statute means what it says, and the construction of such facility in accordance with § 56-585 G is in the public interest.

Costs of the Facility

The General Assembly of Virginia also explicitly directed as follows: "[A] distributor that *constructs*, or causes to be constructed, such facility shall have the *right to recover the costs of the facility*, including [AFUDC], life-cycle costs, and costs of infrastructure associated therewith, plus a fair rate of return, through its rates for default service."⁹ This cost recovery includes all costs prudently incurred prior to operation of the Plant.

In this regard, Dominion Virginia Power asserts that "[a]t the close of its books in 2006, any AFUDC not capitalized and credited to income for 2006 will be lost for that time period – even if the Plant is approved and built – because the Company cannot retroactively restate its 2006 financial statements for AFUDC that was not authorized and credited to income during that period. The same is true for each quarter of 2007 in which AFUDC is not capitalized and credited to income."¹⁰ The Company explains that "AFUDC is capitalized until the Plant is in operation by concurrent credits to the income statement and charges to utility plant."¹¹

⁷ Va. Code § 56-585 G (emphasis added).

⁸ See, e.g., Staff's August 31, 2006 Response at 3-4.

⁹ Va. Code § 56-585 G (emphasis added).

¹⁰ Dominion Virginia Power's October 11, 2006 Response at 13.

¹¹ *Id.* at 12.

As noted above, § 56-585 G mandates that if the Company *constructs* the Coal Plant, it shall have the right to recover the costs of the facility, including AFUDC. To retain that right, for regulatory accounting purposes the Company should follow the guidance as outlined in the Federal Energy Regulatory Commission's Uniform System of Accounts for recording costs of the facility, including any AFUDC. The Company may accrue AFUDC on any and all costs associated with this facility in Virginia under the same methodology and rate that it is accruing such costs in its other jurisdictions.¹² Accordingly, this will allow the Company to capitalize AFUDC by concurrent credits to the income statement and charges to utility plant, and to seek appropriate recovery of AFUDC when it files its petition for approval to construct the Plant.¹³

Bidding Rules

We agree with Dominion Virginia Power that the Commission may waive the Bidding Rules¹⁴ for a proposed coal-fired generation facility under § 56-585 G of the Code. Section 56-585 G directs that the "Commission shall consider any petition filed under this subsection *in accordance with its competitive bidding rules* promulgated pursuant to § 56-234.3, and in accordance with this chapter" (emphasis added). The Bidding Rules, in turn, explicitly state that "[a] utility may file for exemptions from any or all of these bidding program requirements."¹⁵ The plain language of § 56-585 G does not restrict the Commission's application of its Bidding

¹² In its most recent Annual Informational Filing filed on May 1, 2006 ("AIF"), the Company identifies that it is currently accruing AFUDC in its other jurisdictions. *Virginia Electric and Power Company d/b/a Dominion Virginia Power - Annual Informational Filing for calendar year 2005*, Case No. PUE-2006-00063, AIF at Schedule 9.

¹³ Consistent with our discussion below under Fair Rate of Return, when the Company files necessary facts with its petition for approval to construct the Plant, the Commission will determine a fair rate of return and method to account for AFUDC relative to this facility.

¹⁴ 20 VAC 5-301-10 *et seq.*

¹⁵ 20 VAC 5-301-10.

Rules. That is, the statute does not state that the Commission shall apply all of the Bidding Rules except for the rule permitting exemptions. We find that the statute permits the Commission to consider exemption requests pursuant to 20 VAC 5-301-10 of the Bidding Rules. Such a finding does not render the statutory directive meaningless; rather, it simply implements the plain language thereof.

In addition, we disagree with the Chief Hearing Examiner's conclusion that the Bidding Rules do "not allow a company to seek, and the Commission to approve, exemption from following a bidding program if one has been adopted."¹⁶ As previously explained, the Bidding Rules explicitly permit exemption requests "from any or all of these bidding program requirements."¹⁷ The phrase "these bidding program requirements" encompasses the specific rules for which the Company seeks an exemption. Indeed, as cited by Dominion Virginia Power, the Commission has previously considered and granted such exemption requests.¹⁸

Accordingly, for purposes of proceeding with the construction of a coal-fired generation facility as embodied in § 56-585 G, we find that the Commission may grant exemptions from any or all of the Bidding Rules. The Company need not issue a request for proposals nor accept bids prior to filing – and, thus, can proceed with dispatch in preparing – its petition for approval to construct the Plant. When such petition is filed, any request for exemptions from the Bidding Rules could be properly addressed by the Commission as an initial, threshold matter.

¹⁶ Chief Hearing Examiner's September 15, 2006 Ruling and Certification to the Commission at 7.

¹⁷ 20 VAC 5-301-10.

¹⁸ See Dominion Virginia Power's October 11, 2006 Response at 17-18.

Fair Rate of Return

We find that the Company is guaranteed the right to recover a fair rate of return on the costs incurred to construct a coal-fired generation facility in accordance with § 56-585 G. As already noted, the General Assembly of Virginia explicitly directed such finding: "[A] distributor that constructs, or causes to be constructed, such facility shall have the right to recover the costs of the facility, including [AFUDC], life-cycle costs, and costs of infrastructure associated therewith, *plus a fair rate of return*, through its rates for default service."¹⁹

We cannot, however, determine a fair rate of return based on the Petition before us. The Company reminds the Commission that "[t]he General Assembly can, for example, prescribe by statute . . . what rate of return is to be allowed."²⁰ The Company is correct; the General Assembly could have included a specific rate of return in § 56-585 G. It did not do so. Rather, the General Assembly directed the Commission to determine a fair rate of return.

As required by the Supreme Court of Virginia, the Commission must have a sufficient "evidentiary basis" for its determination of a fair rate of return.²¹ The Supreme Court of Virginia, in adopting an explanation by Commissioner H. Lester Hooker, has further directed as follows: "As Commissioner Hooker said: 'A fair rate of return can never be established by a rule of thumb. It requires in our opinion, a consideration of all evidence of record and a

¹⁹ Va. Code § 56-585 G (emphasis added).

²⁰ Dominion Virginia Power's October 11, 2006 Response at 3.

²¹ *Appalachian Power Co. v. Commonwealth of Virginia*, 216 Va. 617, 625 (1976) ("[W]e have been able to ascertain, albeit with some difficulty, the evidentiary basis for the rate of return allowed by the majority.") (*"Appalachian"*). See also *Commonwealth of Virginia, Ex. Rel., Division of Consumer Counsel, Office of the Attorney General v. The Potomac Edison Co., and State Corp. Comm'n*, 233 Va. 165, 172 (1987) ("[In *Appalachian*], we said that even though the Commission's opinion was nonspecific, inadequately documented, and lacking in the Commission's usual detail and quality, we were nevertheless able 'to ascertain . . . the evidentiary basis for the rate of return allowed by the majority.'").

conclusion based on the evidence and on judgment and experience."²² Furthermore, it is well established that "a utility company has no vested right to demand that any particular method be used by a regulatory body in determining its rate of return."²³

Section 56-585 G directs that the fair rate of return is to be recovered through rates for default service and, accordingly, clearly directs that the Company "*shall* file with its application a plan, or a revision of a plan previously filed, . . . that *proposes default service rates to ensure such cost recovery and fair rate of return*" (emphasis added). We cannot determine a fair rate of return without contemporaneously considering the Company's proposed changes in default service rates charged to its residential and other customer classes. In addition, the Electric Power Supply Association and Coral Power object to any changes in default service rates that have the effect of recovering Plant costs from customers that switch to competitive suppliers;²⁴ issues such as this are also relevant to an analysis of the Company's risk and, therefore, to the determination of a fair return. The Petition, however, does not include a specific proposal for recovery through default service rates. The Petition also does not include additional information necessary for a reasonable evaluation of a fair return, including the actual owners of the Plant, specific cost data for the Plant, projected cash flows, and financing mechanisms for the Plant.

Dominion Virginia Power and several public witnesses assert that the term "liberally construe" as used in the statute permits the Commission to determine a fair rate of return at this time. Specifically, § 56-585 G directs that the "construction of such facility that utilizes energy

²² *Board of Supervisors of Arlington County v. Virginia Elec. and Power Co.*, 196 Va. 1102, 1120 (1955).

²³ *Roanoke Gas Co. v. State Corp. Comm'n*, 225 Va. 186, 189 (1983) (quoting *Central Tel. Co. of Va. v. State Corp. Comm'n*, 219 Va. 863, 878 (1979)).

²⁴ Electric Power Supply Association's September 21, 2006 Comments at 4; Coral Power, L.L.C.'s September 18, 2006 Comments at 2-3.

resources located within the Commonwealth is in the public interest, and *in determining whether to approve such facility*, the Commission shall *liberally construe* the provisions of this title" (emphasis added). The plain language thereof directs the Commission to liberally construe the provisions of Title 56 when we are determining whether to approve such facility; the Company, however, has clearly and steadfastly explained that it is not now asking the Commission to determine whether to approve such facility. Additionally, as noted herein the Commission cannot determine a fair rate of return based on the facts before us.

Petition to Construct the Plant

In establishing a fair rate of return, the "Commission must exercise its informed judgment within a zone of reasonableness."²⁵ The current Petition, however, is devoid of facts that we must at least consider in order to exercise informed judgment in determining a fair return. The Commission awaits additional information in the Company's petition to construct the Plant so that we can move this process forward towards fulfilling the statute's goal of building a coal-fired generation facility that utilizes Virginia coal and is located in the coalfield region of the Commonwealth. Indeed, § 56-585 G is unambiguous that construction of such a facility is in the public interest, and we have permitted the Company to record costs for future recovery in accordance with the public interest declaration in the statute. Such accrual, however, must not continue indefinitely. Accordingly, in furtherance of the policy set forth in § 56-585 G, the Company shall file its petition for approval to construct a facility thereunder within twelve months from the date of this Final Order or cease booking AFUDC.²⁶

²⁵ *Appalachian* at 626 (citing *Commonwealth v. Portsmouth Gas Co.*, 213 Va. 239, 242 (1972)).

²⁶ The Company may seek the Commission's consideration for an extension of such date for good cause shown.

Conclusion

In sum, we have decided that:

- 1) construction of a coal-fired generation facility pursuant to the terms of § 56-585 G of the Code that utilizes Virginia coal and is located in the coalfield region of the Commonwealth is in the public interest;
- 2) the Company may accrue AFUDC as set forth herein to preserve its right to recover such costs pursuant to the terms of § 56-585 G of the Code;
- 3) the Company shall file a petition for approval to construct a facility under § 56-585 G within twelve months from the date of this Final Order or cease booking AFUDC as set forth herein; and
- 4) the Commission may grant exemptions from any or all of the Bidding Rules for a proposed coal-fired generation facility under § 56-585 G of the Code.

Accordingly, IT IS HEREBY ORDERED THAT the Company shall proceed in accordance with the terms of this Final Order; THAT the Motion to Dismiss filed by the Virginia Committee for Fair Utility Rates is granted for the reasons set forth herein; and THAT this case is dismissed without prejudice for the Company to file its petition for approval to construct the Coal Plant.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.

A True Copy
Teste:


Clerk of the
State Corporation Commission